1992

Robert Berrett v. Denver and Rio Grande Western Railroad : Reply to Brief in Opposition

Utah Supreme Court

BRIEF

IN THE UTAH SUPREME COURT

ROBERT BERRETT, et al., Plaintiffs/Respondents, vs. DENVER & RIO GRANDE WESTERN RAILROAD, Defendant/Petitioner.	Supreme Court No. 920223 Court of Appeals No. 910215-CA Priority No. 16

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PETITION FOR REVIEW FROM A DECISION AND JUDGMENT OF THE UTAH COURT OF APPEALS

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

1. The Railroad Advances Two "Special and Important Reasons" For Granting Certiorari.

The Landowners insist that the Railroad has failed to state adequate grounds for this Court to accept this action for review. Utah R.App.P. 46 states that this Court will grant review of a decision of the Court of Appeals only for "special and important reasons." Among these is "a decision that has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of the Supreme Court's power of supervision. . . ." Utah R.App.P. 46(c). Judge Bench's majority Opinion, contrary to the Landowners' contentions, so departs in two respects: (a) the decision overrides the trial court's exercise of case management discretion by treating exclusion of an expert as a discovery ruling governed by a "possible contempt" standard, and (b) through misinterpretation and misapplication of this Court's holding in Joseph v. W.H. Groves Latter-Day Saint Hospital, 7 Utah 2d 39, 318 P.2d 330 (1957), the decision relieves the Landowners of any obligation to proffer excluded evidence by presuming Rule 61 materiality from the Railroad's mere objection to the introduction of such evidence. These are vital rulings impacting trial court docket management as well as the evidentiary prerequisites for appellate review. See also Utah R.App.P. 46(d). This Court should review the Court of Appeals' decision.

2. The Court Of Appeals Erroneously Reversed A Case Management Decision Based Upon Rules Of Civil Procedure Applicable Only To Discovery.

The, Court of Appeals, the Landowners and the Railroad all agree that the trial court's exclusion of Shroder was a case management decision. Yet, as the following quotations from the majority opinion establish, the Court of Appeals' entire review of the exclusion of Shroder rested on application of discovery rules, Utah R.Civ.P. 26(f) and 37(b)(2):

> A trial court's power to sanction a party for failure to cooperate in discovery comes from rule 37(b)(2) of the Utah Rules of Civil Procedure. [Op., p. 6-7.] * * * [N]or did the trial court enter any order establishing any deadlines for the final disclosure of witnesses pursuant to the discretion granted to it under rule 26(f). [Op., p. 8.] * * * We hold that absent an order creating a judicially imposed deadline, a trial court may not sanction a party by excluding its witnesses under rule 37(b)(2). [Op., p. 9.]

These discovery rules are relevant, if at all, only to reference three of the sanctions available to the trial court in a case management context. See Utah R.Civ.P. 16(d). They do not serve to define the scope of the trial court's discretion.

Missing from the majority's analysis is any consideration or even mention of Utah R.Civ.P. 16 or the court's inherent powers (under which case management decisions are made) and the fuller range of discretion these clearly afford. Rather, the majority adopts Ohio precedents imposing a discovery-based "possible contempt" standard (Op., pp. 6-7, 9, 10 n.9.), and disregards persuasive Tenth Circuit and constitutional authorities that recognize the broader and more flexible

standards of discretion under Rule 16 and the inherent judicial powers for case management decisions. See Pet. for Cert. at 11-14; Utah Const. Art. 8, §§ 1, 3-4. Application of such standards to Judge Christensen's enforcement of his oral directive[1] would mandate the affirmance of the judgment in favor of the Railroad.[2]

3. The Landowners' Admission Of Failure To Make Any Record Of Shroder's Proposed Testimony Confirms That The Majority Opinion Erroneously Shifts The Rule 61 Burden To The Railroad.

The Landowners concede that they made no proffer. (Opp. Brief, p. 9.) Thus, when the Court of Appeals majority concluded that Shroder's testimony might have changed the result at trial, they necessarily did so without the slightest idea of what Shroder might have said to the jury. This speculative result was based entirely upon the fact that the Railroad made an objection, not just to the naming of Shroder, but to the naming of seventy-eight new witnesses only two weeks before trial. The legal significance attached to that objection, in turn, was

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[1] A written, entered order is not a prerequisite to an enforceable case management directive. See Goforth v. Owens, 766 F.2d 1533, 1534-35 (11th Cir. 1985).

[2] In this regard, contrary to the Landowners' claims, Dugan v. Jones, 615 P.2d 1239 (Utah 1980) is not on point. Unlike Dugan, this action involved a jury trial and the passage of only a few days between the trial court's oral directive and the deadline set for compliance. As it was, the Landowners were allowed to call and did call two timely-named, qualified expert witnesses on the issue of causation. Nonetheless, by naming seventy-eight new witnesses only two weeks before trial, the Landowners deprived the trial court of an effective remedy to sanction their disregard for its directive except to exclude late-disclosed witnesses including Shroder.

premised on a severe misreading of this Court's opinion in Groves, supra resulting in a misallocation of the burden under Utah R.Civ.P. 61 to show substantial error.

In contrast to this action, the trial court in Groves admitted into evidence the doctor's notes in dispute and they were before this Court on appeal. The Court's comments in Groves were directed not to the admissibility of the evidence excluded, but to the use at trial of writings already in evidence, i.e., whether counsel could read from and refer to the doctor's notes in closing argument. (These notes arguably would have proven the negligence of the defendant hospital.) The Court concluded that the limitations on use of the notes imposed by the trial court were error. While the defendant insisted that any error was harmless, this Court found that counsel's inability to refer to or argue the significance of the doctor's notes was prejudicial.

To bolster its holding, the Court considered whether the defendant's specific objection, which had resulted in the ruling preventing use of the notes in closing, was consistent with the belated cry of harmless error. The Court's comment on this inconsistency, by no means the determinative basis for the Court's holding, is the language that the majority opinion finds pertinent to the facts of this case. However, the objecting party in Groves was not required to answer for its objection in the absence of a proffer (as is the case here); rather, with full knowledge of the substance of the evidence in question, the Groves court resolved a close question under Utah R.Civ.P. 61

against the party that had strenuously resisted a specific and proper use of competent evidence.

This result is hardly authority for relieving a party of its obligation to place before the Court by way of proffer evidence which is the subject matter of an appeal.[3] In fact, Groves more correctly stands for the proposition that the Court must have the evidence at issue before it in order to evaluate the materiality of any purported error. Only where review of the substance of the evidence is possible and the nature of a limitation imposed by the trial court leaves unresolved the issue of materiality may the appellate court attach legal significance to the objections of the resisting party.

CONCLUSION

For the above reasons, the Court should grant the Railroad's Petition for Writ of Certiorari and review the Court of Appeals' decision.

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[3] Dugan is no more helpful to the Landowners on this point than it is on abuse of discretion. The exclusion of the defendants' appraisal experts by the Dugan trial court "precluded them from proving their case." 615 P.2d at 1244. There was no need to inquire into the substance of what was to be said by these witnesses to know if the trial result might have been different. There could be no doubt that the inability to prove the damage element through valuation evidence would preclude the plaintiff from proving all of the elements of its case in chief.

DATED this 26th day of June, 1992.

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CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI to be mailed, postage prepaid, this 16th day of June, 1992, to the following:

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